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In The

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN/ASIAN AMERICAN FACULTY AND STAFF ASSOCIATION OF THE UNIVERSITY OF TEXAS AT AUSTIN, ASIAN DESI PACIFIC ISLANDER AMERICAN COLLECTIVE OF THE UNIVERSITY OF TEXAS AT AUSTIN, OTHER ASIAN AMERICAN AND PACIFIC ISLANDER EDUCATION AND YOUTH-SERVING ORGANIZATIONS, AND HIGHER EDUCATION OFFICIALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The Asian American Legal Defense and Education Fund ("AALDEF"), the Asian/Asian American Faculty and Staff Association of the University of Texas at Austin, the Asian Desi Pacific Islander American Collective at the University of Texas at Austin, and 18 other Asian American and Pacific Islander education and youth-serving organizations, and 44 higher education faculty and officials (listed in full in the Appendix) submit this brief as amici curiae in support of the University of Texas at Austin ("UT") in this case.[1] Amici comprise a broad range of organizations and individuals working on issues affecting Asian American and Pacific Islanders in kindergarten through 12th grade and higher education.

AALDEF, headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF protects the rights of Asian American and Pacific Islander youth and supports educational equity in higher education. AALDEF has an interest in this litigation because its work with community-based youth advocates

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[1] In accordance with Supreme Court Rule 37.3, all parties have consented to the filing of amicus briefs, and copies of the letters of general consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for amici state that this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici or their counsel.

across the country reveals that Asian American and Pacific Islander students benefit from individualized race-conscious admissions policies as well as from diverse educational settings.[2]

AALDEF's co-amici include two organizations with the express purpose of supporting Asian American and Pacific Islander staff and students at UT. The Asian/Asian American Faculty and Staff Association aims to unite Asian and Asian American faculty and staff at UT and promotes networking and support for equal opportunity, growth, and mutual benefit among its constituents. The Asian Desi Pacific Islander American Collective is a student organization dedicated to empowering Asian American and Pacific Islander students at UT. These organizations and individual faculty members believe that UT's narrowly tailored, individualized admissions program strongly benefits the Asian American and Pacific Islander community and urge this Court to uphold it as constitutional.

SUMMARY OF ARGUMENT

The admission of students with a "broad[] array of qualifications and characteristics" advances the compelling interest of colleges and universities in

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[2] Amici have joined a group of AANHPI community organizations supporting affirmative action policies that promote equal opportunity in higher education. *See Asian American, Native Hawaiian And Pacific Islander Community Organizations Stand Up For Equal Opportunity In Higher Education*, ASIAN AMERICAN CIVIL RIGHTS (May 14, 2015) http://asianamericancivilrights.org/letter-equal-opportunity-higher-education.

attaining a diverse student body and the educational benefits that follow. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.)); accord *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013). By considering the achievements of undergraduate applicants in the context of the attributes and obstacles that have influenced them, institutions like UT not only enrich academic discourse and classroom learning, but also open new pathways for success.

Racial and ethnic origin is but one factor considered in the larger achievement matrix that UT uses in its individualized review of applicants who are not entitled to automatic admission under Texas's Top Ten Percent Law ("Top 10% Law"). This factor provides an important texture to an applicant's profile without predominating over other defining qualities and factors. Asian Americans and Pacific Islanders – a unique cross-section of identities and experiences that spans a range of comparative privilege and disadvantage – benefit from this individualized approach to admissions, as do Africans Americans, Latinos, and Whites.

Plaintiff and some of the amici who support her position erroneously assert that members of particular specified racial groups are the only beneficiaries of UT's admissions policy. From this faulty premise, they repeatedly and incorrectly contend that UT has expanded admissions opportunities for Hispanics or Latinos at the expense of Asian Americans.

In reality, a narrowly tailored, individualized admissions program like UT's can strongly benefit the Asian American and Pacific Islander community. UT's review process allows for the consideration of educational inequities faced by students from certain subgroups that are frequently hidden by the aggregation of data into a single "Asian" category. Students belonging to these subgroups in Texas and elsewhere have faced pervasive social and economic disadvantages akin to those experienced by many African Americans and Latinos, educational attainment levels that are among the lowest of all ethnic and racial groups, and even racial intimidation and harassment. Many of their parents (if not the students themselves) made a difficult transition to the United States as refugees, and others come from communities that have been subjected to colonization on their own native land. By considering the role that these students' racial and ethnic origin has had on their experiences and achievements, UT's admissions process encourages racial disaggregation and individualized treatment and thwarts the harmful "model minority" myth that masks tremendous diversity within the Asian American and Pacific Islander community. Many Asian applicants in communities struggling with low educational attainment will suffer if admissions programs such as UT's are dismantled.

Several key arguments presented by plaintiff and her amici rely on factual distortions and the improper treatment of Asian Americans as a monolithic group. First, they assert that UT has deemed Asian Americans to be "overrepresented" on

its campus. That claim is completely untrue. Second, they assert that UT has limited admission of Asian American students in order to match the racial demographics of Texas. Since UT adopted its race-conscious policy, however, the percentage of Asian American students enrolled at UT has exceeded the percentage of Asian Americans in Texas by more than a factor of five. Third, plaintiff and her amici claim that UT has engaged in discrimination against Asian American applicants, but their claim mischaracterizes how UT's program works and conflates affirmative action with negative action, whereby a university discriminates against a racial group in order to suppress their levels of enrollment. The undersigned amici would vigorously oppose any form of negative action, formal or informal, affecting Asian Americans or any other group – but there is simply no evidence in the record of such negative action at UT.

For these reasons and those described below, this Court should uphold UT's admissions policy as constitutional.

ARGUMENT

I. THE RECORD DOES NOT SHOW THAT UT'S ADMISSION PROCESS DISCRIMINATES AGAINST OR DISADVANTAGES ASIAN AMERICAN APPLICANTS.

The record in this case establishes that in its effort to obtain the educational benefits that result from student diversity, UT uses race within the context of "a highly individualized, holistic review"

that gives "serious consideration to all the ways an applicant might contribute to a diverse educational environment." *See Grutter*, 539 U.S. at 337. As plaintiff herself has admitted, UT has not established a "goal, target, or other quantitative objective" for the admission of any particular group. *See* S. Ct. JA 181a. Instead, it allows applicants of all races, including Asian Americans and Pacific Islanders, to benefit from the consideration of their race in the distinctive context of their background and experience. Although plaintiff has abandoned her argument from *Fisher I* and in the Fifth Circuit that UT's policies discriminate or otherwise disadvantage Asian Americans, plaintiff's amici the Asian American Legal Foundation ("AALF") and Jonathan Zell ("Zell") (collectively, "Plaintiff's Amici") continue to press the argument before this Court.[3] As discussed below, the arguments by Plaintiff's Amici that Asian Americans[4] are somehow victimized by this policy of individualized review are entirely unfounded in law and fact.[5]

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[3] The other amici in *Fisher I*, who argued that UT's policies discriminate or otherwise disadvantage Asian Americans, have foregone the opportunity to file amici in the current appeal.

[4] Plaintiff and her amici do not allege particular harm to Pacific Islanders resulting from UT's individualized admissions process.

[5] The undersigned amici challenge plaintiff's standing as a White female to seek redress for harm purportedly suffered by Asian American applicants as a result of UT's admission policy – in addition to the other serious deficiencies of standing in this case identified in the Brief for Respondents ("UT Br.") at 6-19.

A. UT Has Not Limited Asian American Admissions to Match the Racial Demographics of Texas or Otherwise Engaged in "Racial Balancing."

Plaintiff's Amici argue that UT has limited admission of Asian American students to "mirror the racial composition of the State of Texas" in order to achieve "racial balancing." AALF Br. at 11 ("UT's true goal is racial balancing— that is, making the student body mirror the racial composition of the State of Texas."); *id.* at 6 (arguing that "the UT admission program at issue is nothing other than forbidden racial balancing"); *see also* Zell Br. at 14 (claiming that "universities use the holistic admissions system to hide their illegal policies and, in particular, their use of race as a way to restrict the number of Asian-Americans for the purpose of racial balancing"). This claim is baseless. A simple comparison of the numbers of Asian Americans that UT admitted and enrolled and the percentage of Asian Americans in Texas shows that UT has made no effort to match the two.

The Asian American population in Texas has rapidly expanded over the last 30 years. For example, from 2000 to 2014 the Asian American population expanded from 562,000 to 1.2 million, or from 2.7% to 4.4% of the total state population. U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2000*, *available at* http://censtats.census.gov/data/TX/04048.pdf; U.S. Census Bureau, *2014 American Community Survey 1-Year Estimates*, *available at* http://factfinder.census.gov/. This rate of increase outpaced even the

Hispanic or Latino population, which increased from 6.7 million to 10.4 million, or from 32% to 39% of the total state population. *Id.*[6] The percentage of Asian American high school graduates in Texas increased from 3.1% in the Class of 1998 to 4.1% in the Class of 2010. *See* Texas Education Agency, *Secondary School Completion and Dropouts in Texas Public Schools 2000-01* at 123-24, *available at* http://tea.texas.gov/acctres/DropComp_2000-01.pdf; Texas Education Agency, *Secondary School Completion and Dropouts in Texas Public Schools 2009-10* at 68-69, *available at* http://tea.texas.gov/acctres/DropComp_2009-10.pdf. By 2014, the percentage of Asian American high school graduates in Texas had increased even more to 4.2%. *See* Texas Education Agency, *Secondary School Completion and Dropouts in Texas Public Schools 2013-14* at 153, *available at* http://tea.texas.gov/acctres/DropComp_2013-14.pdf.

The percentage of Asian Americans in UT's freshman class has increased at an even faster rate. From 1986 to 2014, Asian Americans rose from 6% of the freshman class to 23%. *See* UT Austin, *1995-1996 Statistical Handbook – Fall Enrollment by*

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[6] In 1980, 120,000 Asian Americans lived in Texas, making up only 0.8% of the overall state population. *See Texas Populations by Race*, CENSUSSCOPE, http://www.censusscope.org/us/s48/chart_race.html (last visited Oct. 29, 2015). By 1990, that number had grown to 300,000, or 1.8% of the state population, *id.*, and by 2014 it reached 1.2 million or 4.3% of the overall state population, *see* U.S. Census Bureau, *2014 American Community Survey 1-Year Estimates*, *available at* http://factfinder.census.gov/.

Level and Ethnicity, *available at* https://www.utexas.edu/sites/default/files/files/SHB95-96Complete.pdf; UT Austin, *2014-2015 Statistical Handbook* at S15, *available at* https://sps.austin.utexas.edu/sites/ut/IRRIS/SitePages/IRRIS.aspx.[7] A visual display of these data shows no correlation between Asian American enrollment at UT and Texas demographics:

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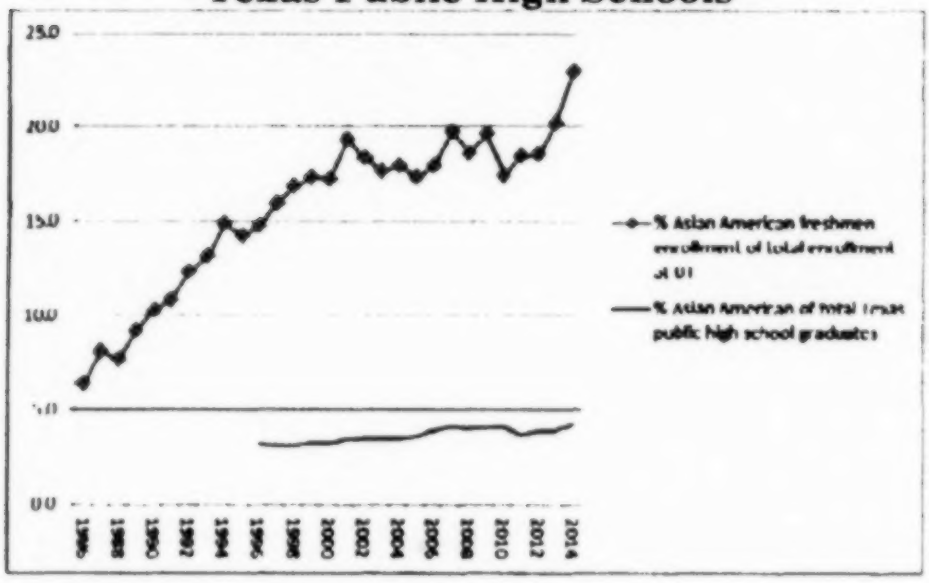
[7] Admissions numbers mimic the trend seen in enrollment. From 1990 to 2014, the number of Asian American applicants whom UT admitted rose from 10% to 21% of all admitted students. *See* UT Austin, *1990-1991 Statistical Handbook* at 23, *available at* https://www.utexas.edu/sites/default/files/SHB90-91Complete.pdf; UT Austin, *2014-2015 Statistical Handbook* at S20, *available at* https://sps.austin.utexas.edu/sites/ut/IRRIS/SitePages/IRRIS.aspx. UT's Statistical Handbooks consolidate data on Asian American admittees from within and outside Texas. UT's Top 10% Reports distinguish between these groups.

Percentage of Enrolled Freshman at UT who are Asian American Versus Graduates of Texas Public High Schools[8]



This rise in Asian American enrollment occurred under both race-neutral and race-conscious admissions. As evident in the blue line above, from 1997 to 2014, the percentage of Asian Americans in the freshman class was not fixed and appears to vary independently from the population of Asian-American public high school graduates. *See* UT Austin, *2000-2001 Statistical Handbook – Fall Enrollment of New Students by Group and Ethnicity, available at* https://www.utexas.edu/sites/default/files/files/SHB00-01Complete.pdf; UT Austin, *2008-2009 Statistical Handbook* at 28;

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[8] As discussed above, data on Asian American freshmen enrollment at UT are taken from UT's *Statistical Handbooks*. Data on Asian American high school graduates in Texas are taken from the Texas Education Agency's *Secondary School Completion and Dropouts in Texas Public Schools* (1996-2014).

UT Austin, *2014-2015 Statistical Handbook* at S20 (2014), ***available at*** https://sps.austin.utexas.edu/sites/ut/IRRIS/SitePages/IRRIS.aspx. This period encompasses six years of race-neutral admissions (following *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)) and twelve years of race-conscious admissions (following *Grutter*).

Thus, if the "true goal" of UT's admissions policy has actually been to make the racial composition of its student body mirror the racial composition of the State of Texas, as Plaintiff's Amici allege, the University has done, as Judge Sparks observed, "a particularly bad job of it," *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 607 n. 11 (W.D. Tex. 2009).

Plaintiff claims in passing that UT "deemed Asian Americans 'overrepresented' based on state demographics." *See* Plaintiff-Appellant's Brief ("Fisher Br.") at 8. There is no support for this claim in the record. UT has described African American and Hispanic students as underrepresented based on their overall enrollment and classroom presence at the university, but it has never declared Asian Americans or any other group to be "overrepresented." Indeed, the portion of the Appendix that Fisher cites in support of this statement make no mention of any purported overrepresentation of Asian Americans. While Fisher may have sought to rely on the district court's opinion in the Western District of Texas, such reliance would be misplaced. In that opinion, Judge Sparks observed only that "compared to their percentage of Texas' population as a whole, Hispanics remain underrepresented" while Asian

Americans "are largely *over* represented compared to their percentage of Texas' population." *See* 645 F. Supp. 2d at 606 (emphasis in original). This empirical observation about the differences between the UT student population and Texas demographics does not support plaintiff's or Plaintiff's Amici's claims about UT's admission policies. To the contrary, as the District Court observed, the fact that the percentage of Asian American students at UT is five times larger than the percentage of Asian Americans in Texas is compelling evidence that no cap on their admissions has been imposed. *See id.* at 607 n.11. In other words, as discussed above, the data only negate plaintiff's claim that UT has limited Asian American admissions to mirror Texas demography.

B. The Record Does Not Demonstrate Negative Action Against Asian Americans at UT.

As noted above, Plaintiff's Amici claim that UT engages in "overt discrimination" against Asian Americans. This is an incendiary claim entirely unsupported by evidence in the record or empirical data. Furthermore, the claim conflates two distinct concepts – affirmative action and negative action – producing a muddled and highly misleading picture of admissions at UT and other selective universities.

1. Narrowly-Tailored Affirmative Action Programs Do Not Constitute Discrimination Against Asian-American Applicants.

Under the Supreme Court's holdings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter*, and now *Fisher I*, universities may pursue educational diversity (of which racial diversity is one element) by taking into account the race of applicants in a narrowly-tailored manner to enroll students from diverse backgrounds. An individualized affirmative action program is completely distinct from negative action, which involves discrimination by a university to suppress or cap enrollment of a particular racial group, such as Asian Americans. *See* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts about Thernstrom's Rhetorical Acts*, 7 Asian Am. L.J. 29, 33, 60 (2000); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 3-4 (1996). To allege racial discrimination by comparing admissions for Asian Americans exclusively with other minorities – as Plaintiff's Amici do – is to fall victim to a causation fallacy that assumes only "a finite number of minorities . . . . can be admitted [to a university and] that spots for certain minorities must come at the expense of other minorities." *See* Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 Mich. J. Race & L. 391, 421 (2008). In other words, it assumes that college

admissions is a "zero sum" game where minorities compete exclusively with one another for seats, and not with Whites as well.[9]

In reality, all applicants to UT and other selective institutions with a race-conscious admissions policy complying with *Gratz*, *Grutter*, and *Fisher* compete in a single pool, regardless of race. Even though racial quotas have been illegal since the Supreme Court's ruling in *Bakke*, plaintiff and Plaintiff's Amici treat collegiate admissions as if a quota for Whites keeps their numbers constant and caps the total number of minorities. In fact, many—if not most—of the spots theoretically made available by ending affirmative action would go to Whites, who comprise a much larger percentage of the population than Asians. *See, e.g.*, Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. Hum. Resources 435, 448-50 (2012). This fact breaks the causal link that Plaintiff's Amici repeatedly claim between race-conscious admissions and alleged discrimination against Asians. Therefore, if there is any suppression in the admission of Asian Americans, it must be caused by something other than race-conscious affirmative action. This is where negative action comes in.

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[9] It also ignores the reality that some universities (but not UT) give preferences in admission to children of alumni, a policy that disproportionately benefits White applicants. *See Affirmative Action for the Rich: Legacy Preferences in College Admission* 127 (Richard D. Kahlenberg ed. 2010).

Negative action creates a de facto cap on admissions for Asian American students in order to preserve spaces for Whites, as opposed to underrepresented minorities. It can be implemented by inflexible, numerical quotas or by an unquantified admissions calculation. Kang, *supra*, at 13. The analysis of whether a university is engaging in negative action against Asian American students must be divorced from any inquiry about the legality of a race-conscious admissions policy. Negative action against Asian American (or other minority) applicants may be real, but it is a phenomenon unrelated to affirmative action. The record before the court does not support the conclusion that UT has engaged in negative action and actively suppressed Asian American admissions in any manner. Indeed, all evidence is to the contrary. Accordingly, this Court should uphold UT's admissions policy as constitutional.

AALDEF and the other amici do not dispute the disturbing history of discriminatory admission policies, particularly at elite private universities, affecting Jews, African Americans, Asian Americans, women, and others. *See* Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (2005). Nor do amici deny the possibility that some institutions may be applying exclusionary admissions policies against minority applicants, including Asian Americans, today. The undersigned amici would vigorously oppose any cap, quota, bias, or other kind of negative action, formal or informal, affecting Asian Americans or any other group.

2. SAT Score Data at UT Do Not Show Negative Action Against Asian Americans.

SAT score statistics at UT do not demonstrate negative action against Asian Americans, contrary to the arguments made by Plaintiff's Amici. *See* AALF Br. at 9 (arguing that "it is Asian American applicants who suffered the greatest harm under race-determinant admissions policies" because Asian American applicants have the highest average test scores); *see also* Zell Br. at 14-15 & 15, n.3 (claiming that "to receive equal consideration in admissions [at elite colleges generally], on the SAT Asian-Americans had to outperform whites by 140 points, Hispanics by 270 points, and Blacks by 450 points out of a possible 1600 points" and claiming that "[d]ata from UT show similar results").[10] Claims about differential standardized test scores

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[10] This statistic comes from a 2009 article by Thomas J. Espenshade, who has since spoken out about the weaknesses in his data. In a 2009 interview, he stated that he did not believe his data establish that there was any bias towards Asian American students in admissions. Scott Jaschik, *The Power of Race*, INSIDE HIGHER ED (Nov. 3, 2009), *available at* https://www.insidehighered.com/news/2009/11/03/elite (explaining that his data did not include "softer variables" such as recommendations, essays, and extracurricular activities that might help explain the disparity). In 2012, Espenshade wrote in an Op-Ed in the New York Times: "To be clear, I believe that race-conscious affirmative action is necessary, and often beneficial." Thomas J. Espenshade, *Moving Beyond Affirmative Action*, THE NEW YORK TIMES (Oct. 4, 2012), *available at* http://www.nytimes.com/2012/10/05/opinion/moving-beyond-affirmative-action.html).

by race are often highly misleading, if not demonstrably false. Differences in average scores among racial or ethnic groups at institutions such as UT reflect the racial/ethnic test score disparities already present in the applicant pool, resulting from socioeconomic differences, educational practices, and other environmental factors. *See* Claude S. Fischer et al., *Inequality by Design: Cracking the Bell Curve Myth* 46 (1996); William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 16 (2d ed. 2000). They are to be expected regardless of whether race neutral or race conscious criteria are used. *See, e.g.*, Maria Veronica Santelices & Mark Wilson, *Unfair Treatment?: The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 Harv. Educ. Rev. 106 (2010); William T. Dickens & Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less Than Meets the Eye*, 38 Indus. Rel. 331 (1999).[11] Racial/ethnic SAT score averages on par with UT's individualized admissions pool are found nationwide, including at other leading universities like UC Berkeley and UCLA that use race-neutral admissions. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* 39 J.C. & U.L. 53, 95 (2013).

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[11] These disparities would exist even in the extreme (but counterfactual) case of a university admitting students in rank order based *solely* on their SAT scores. *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1064 (2002).

The College Board, which created the SAT, has itself acknowledged this phenomenon. *See* Jennifer L. Kobrin et al., *A Historical View of Subgroup Performance Differences on the SAT Reasoning Test* 19 (The College Board 2007), *available at* http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2006-5-historical-view-subgroup-performance-sat.pdf (finding that score gaps between different racial groups have "remained generally consistent" for 20 years).

This is as true at UT as elsewhere. Even though Plaintiff's Amici repeatedly suggest that Asian American applicants must achieve higher SAT scores in order to gain admission to UT, *see, e.g.*, AALF Br. at 8-9, it merely observes that in 2008, Asian American students admitted through individualized admissions had a mean SAT score of 1346 (on a scale of 1600), compared to a mean score of 1300 for Whites. *Id.* From this data point, one cannot extrapolate that Asian Americans suffer the greatest harm from UT's policy. *See id.* at 9. These differences cannot be attributed to UT's race-conscious admissions policy because similar variations in SAT scores existed throughout UT's race-neutral admissions period between 1997 and 2004. *See* SJA 49a-63a. For example, in 2004, the year before the current race-conscious policy took effect, the mean SAT score for enrolled Asian American students admitted through individualized review was 1304 (on a scale of 1600), 37 points higher than Whites, 115 points higher than Hispanics, and 188 points higher than African Americans in the same pool. *See id.* at 50a-53a.

Similar gaps have existed and continue to exist in SAT scores for students admitted under the race-neutral Top 10% plan. For example, in 2009, Top 10%-admitted Asian American enrollees had a mean SAT score of 1874 (out of 2400), compared to 1864 for Whites, 1628 for Hispanics, and 1584 for African Americans. *See* 2010 Top 10% Report at 14.[12] It is thus spurious to attack UT's admissions policy based on a longstanding phenomenon that has existed under race-neutral and race-conscious policies alike.

In addition, SAT scores are not the ultimate and only indicator of merit in educational admissions. In fact, standardized test scores are only one among many factors considered in UT's individualized review process, and their predictive power has been called into question by numerous studies, *see, e.g.*, Sunny X. Niu & Marta Tienda, *Test Scores, Class Rank, and College Performance: Lessons for Broadening Access and Promoting Success*, 2 Rass Ital Sociol. 199 (2012). Significantly, students admitted under the Top 10% plan achieve on average better grade point averages in their first year at UT than non-Top 10% students, even though non-Top 10% students have on average higher SAT scores. *See* JA 393a-394a; SJA 49a-53a. SAT scores can also be boosted by test-preparation courses, to the advantage of those with financial means rather

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[12] Similar score gaps can be found in reported ACT scores. 2010 Top 10% Report at 15. Beginning in 2009, UT stopped converting applicants' ACT scores into equivalent SAT scores due to changes in the structures of both tests. *Id.* at 3.

than merit. *See* Jay Rosner, *Disparate Outcomes by Design: University Admissions Test*, 12 Berkeley La Raza L.J. 377, 383-84 (2001); Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 Am. Soc. Rev. 487, 490-91 (2007). For these reasons, while a statistically significant difference in SAT scores between Asian American and White admittees might be one indicator of negative action, it would be far from sufficient to establish a prima facie case of discrimination.

Plaintiff's Amici make no effort to analyze differences between the SAT scores of Asian and White students at UT.[13] An examination of those scores does not show that negative action is afoot. First, mean SAT scores of Whites and Asians at UT admitted through individualized admissions (both before and after implementation of the current policy) reflect only small differences.[14] Second, an analysis of (i) SAT scores by major and (ii)

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[13] As discussed in Section II, *infra*, Asian Americans are a highly diverse community with a broad range of religious and cultural differences, immigration histories, and socioeconomic experiences. This diversity is reflected in substantial SAT and educational attainment disparities among different Asian American subgroups.

[14] The score differential between 1996 and 2008 fluctuated within 6 and 46 points, which is minimal in light of the range of possible scores. *See* SJA 50a, 52a; UT Austin, *Implementation and Results of the Texas Automatic Admissions Law* at 12 tbl.6a, 13 tbl.6c, *available at* https://www.utexas.edu/student/admissions/research/HB588-Report12.pdf.

concentration of racial groups across majors reveals a likely nondiscriminatory reason for these differences. UT requires Texas residents to apply to undergraduate programs by selecting a first-choice and second-choice major.[15] Based on these priorities, UT admits students generally into one of six colleges (Liberal Arts, Social Work, Nursing, Business, Communications and Geosciences) or into a specific major at three other colleges (Natural Sciences, Education, and Engineering). Asian Americans at UT are more concentrated in schools with the higher mean SAT scores at UT (e.g., Business, Engineering) and have lower concentrations in schools with the lower SAT scores (e.g., Education and Fine Arts). *See* SJA 54a-63a; 166a; 2010 Top 10% Report at 14-15. By contrast, Whites have larger concentrations in some of the schools with the lowest SAT scores. Thus, along with the complex nature of individualized review and the various environmental factors and predictability concerns discussed above, students' selection of majors explains in part the minor difference in scores between Asian American and White enrollees at UT.[16] Third, these numbers fail

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[15] Admissions for Texas residents are handled centrally by UT for eleven of its undergraduate schools. JA 458a. The School of Architecture and School of Fine Arts make their own admissions decisions. JA 459a.

[16] Consistent with UT's experience, national studies show that SAT scores for students who intend to study engineering and natural sciences tend to be at the high end of standardized test score distributions. *See* College Board, *College-Bound Seniors Total Group Profile Report* 13 (July 2010), *available at*

to account for the distribution of SAT scores among Asian Americans and Pacific Islanders. Asian Americans have the widest distribution in standardized test scores and a higher standard deviation than Whites. *See* Robert T. Teranishi et al.,, *Heterogeneity among Asian Americans: Implications for Using Standardized Test Scores to Estimate Discriminatory College Admissions Practices*, CARE (forthcoming Nov. 2015) (on file with authors). While the SAT scores of White students have a normal distribution, the SAT scores of Asian Americans have a bimodal distribution. *Id.* ("Whites have a normal distribution that is consistent with how scores are distributed from the mean for other racial groups. Asian Americans have a higher representation at the top scores, lower representation among middle-range scores, and higher representation among lower scores."). Thus, mean SAT scores do not tell the whole story.

Plaintiff's Amici have not meaningfully analyzed these data. They do not address the longstanding SAT score disparities among admittees under UT's race-neutral Top 10% plan, which, as discussed above, indicate the impact of factors independent of race-conscious admissions, and are unable to correlate higher standardized test scores with better academic performance at UT. Instead, they seeks to manipulate the causation fallacy to "triangulate" Asians as unwitting victims of UT's individualized

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https://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf.

admissions process.[17] The Court should reject this unfounded effort.

Even if Plaintiff's Amici had analyzed these numbers, SAT scores are a poor proxy for whether students should be admitted because, inter alia, the SAT scores of minority students are tainted by what social scientists describe as "stereotype threats." Stereotype threats are a phenomenon whereby individuals fear confirming negative stereotypes of their minority group and said fear hurts their performance. *See* T. Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 Psychol. Rev. 336, 336 (2008) ("[A] large body of work now testifies to the reliability and generalizability of stereotype threat effects on performance."). "[A]ctivating negative stereotypes about a social identity one possesses motivates individuals to try to combat that stereotype but that this creates some sort of extra situational burden that interferes with the ability to perform as well at a task as might otherwise be possible." *Id.* For example, when told questions are designed to test their intellectual ability, minority students perform

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[17] *See* Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 122-23 (1999) (observing that opponents of affirmative action in 1980s attempted to shift debate "from the real issue at hand—whether or not several leading universities imposed racial quotas on Asian American students to preserve the Whiteness of their student bodies—to the false issue of whether affirmative action programs designed to benefit Blacks and Latinos unfairly discriminated against Asian Americans").

worse than their White peers, but this gap diminishes when the students are told the same questions are non-diagnostic. *Id.* at 336-337. For this reason, SAT scores cannot be the whole story when evaluating potential students. A college seeking to admit students with the most potential must look beyond these tainted scores and consider the whole applicant, including whether other factors (e.g. race-based stereotyping) may have corrupted said scores.[18]

II. UT'S POLICY OF INDIVIDUALIZED REVIEW IS BENEFICIAL TO ASIAN AMERICANS AND PACIFIC ISLANDERS.

Another overriding theme of Plaintiff's Amici is that UT's admissions process for non-Top 10% applicants is discriminatory because it uses race to benefit Hispanics or Latinos, but not Asian Americans. *See, e.g.*, AALF Br. at 6 ("[U]nder the plan being challenged in this case, UT insisted on giving preferences to Hispanic applicants, while disfavoring Asian American applicants . . ."). As

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[18] Stereotype threats also harm the performance of students once enrolled in college. *See* J. Owens and D.S. Massey, *Stereotype Threat and College Academic Performance: A Latent Variables Approach*, 40 Soc. Sci. Res. 150 (2011). Increased diversity minimizes the effect. Underrepresentation breeds stereotypes; however, when a group is sufficiently represented, the burden on each individual student is lessened, and stereotype threat has less of an effect. *See* V. Purdie-Vaughns et al., *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. Pers. Soc. Psychol. 615 (2008).

discussed below, these claims fundamentally misapprehend how the process works. Under UT's system of individualized review, no student automatically benefits just because he or she belongs to an underrepresented or disadvantaged group. To the contrary, all students, including Asian Americans and Pacific Islanders, can benefit from UT's individualized consideration of applicants' race in the distinctive context of their background and experience. *See* UT Br. at 30-31. In fact, UT's admissions policy benefits Asian Americans and Pacific Islanders by allowing for the consideration of economic and educational inequities faced by students from certain subgroups – differences that are often hidden by the aggregation of data into a single "Asian" category and the promulgation of the pervasive and harmful "model minority" myth.

A. The Educational Benefits of Student Diversity Accrue to All Students.

At the outset, it is critical to recognize that the benefits from the diversity produced by an individualized race-conscious admissions process accrue to all students, including Asian Americans and Pacific Islanders. Studies have demonstrated that interactions with a diverse student body, both in and out of the classroom, lead to positive learning and civic outcomes for Asian American students. *See* NYU CARE, *Asian Americans and the Benefits of Campus Diversity: What the Research Says* 1 (2012), *available at* http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian_am_diversity_D4.pdf; Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on*

Educational Outcomes, 72 Harv. Educ. Rev. 330, 351-353, 354 tbl.3 (2002); Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences*, 82 J. Higher Educ. 416, 434 (2011) (observing that while "the effects of intergroup learning on the pluralistic measure were significant for all other groups," Asian American students "seem to demonstrate the strongest benefit"). These benefits continue as students graduate and enter the "increasingly diverse workforce and society." *See Grutter*, 539 U.S. at 330 (citation omitted). Student diversity also has positive social effects on the campus as a whole. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring); *Grutter*, 539 U.S. at 328-29; *Bakke*, 438 U.S. at 312-13. Asian Americans and other groups come to see each other more favorably, which leads to improved intergroup relations and reduced racial stereotyping. *See Grutter*, 539 U.S. at 328-29.

B. Asian Americans and Pacific Islanders Benefit from UT's Individualized and Narrowly Tailored Admissions Process.

Furthermore, all students, including Asian Americans and Pacific Islanders, can directly benefit from UT's individualized consideration of their race and ethnic background. In fact, contrary to the unsupported assertions made by Plaintiff's Amici, data show that since 2004 Asian American applicants have consistently fared better than

Hispanic applicants in UT's race-conscious admissions process for non-Top 10% applicants.

1. The "model minority" myth masks tremendous diversity within the Asian American and Pacific Islander community.

The treatment of any racial population as monolithic is problematic, and falls prey to racial stereotyping. Asian Americans are a highly heterogeneous group that encompasses a broad range of socio-historical, cultural, religious, economic, language, and political diversity. Because Asian Americans as well as Pacific Islanders, with whom Asians have historically been aggregated into a combined racial category, have such high levels of diversity, it is impossible to generalize a "typical" Asian American experience. Robert T. Teranishi, *Asians in the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education* 26 (2010).

In particular, the "model minority" myth, which correlates Asian American and Pacific Islander identity with academic and professional achievement and mobility, fails to capture the complex reality of their experience. This "monolithic image of success" inappropriately "lumps all Asian Americans together, implying that the needs of recent Southeast Asian refugees can be ignored because third- or fourth-generation Japanese or Chinese Americans have been relatively successful." Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian Am. L.J. 71, 90 (1997). The stereotype also

downplays what Plaintiff's Amici rightly identify as longstanding racial discrimination against Asian Americans, *see* AALF Br. at 23-28, and contributes to the persistence of discrimination today, *see* Frank H. Wu, *Yellow: Race in America Beyond Black and White* 49-77 (2003); Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-39 (1993).

a. The Different Immigration Histories of Asian American and Pacific Islander Subgroups Have Shaped Their Socioeconomic Experiences in the United States

Differences in the migration paths taken by Asian American and Pacific Islander subgroups have led to substantial economic and educational disparities in the Asian American community today. Some Asian immigrants voluntarily traveled to the United States for better opportunities, were prepared to leave their homelands, and had connections here to help get them on their feet. Many were admitted to the United States under immigration policies giving employment preference to professionals who "hold[] advanced degrees" or have "exceptional ability." *See, e.g.*, Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. Large percentages of immigrants from countries like Singapore, Korea, India, China, Japan, and Taiwan arrived as the result of employment preferences, and "[t]he capital that these individuals possess is

often correlated with educational and social mobility in the United States." Teranishi, *Asians in the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education*, *supra*, at 27.[19]

By contrast, the cultural capital of refugees who entered in the "surge of immigration from Southeast Asian countries . . . starting in 1975 under refugee and asylee status" has been profoundly different. *Id.* More than one million Vietnamese, Cambodian, Hmong, Mien, and Laotians arrived from 1975 to 1990 after the end of the Vietnam War, and nearly all were refugees. Most started their new lives in America with few material goods, their remaining family members scattered or lost, and often traumatized by war, their escape, and often years in refugee camps. They were forced to navigate a country and social and educational systems unfamiliar to them and for which they were unprepared, hindered by a lack of English fluency and inherent economic and social disadvantages.

Native Hawaiians, a subgroup of Pacific Islanders, and Pacific Islanders in U.S. territories such as Guam and Samoa are not immigrants at all, and like Native Americans have been subjected to

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[19] In 2013, the United States admitted 95,975 immigrants from Asia under the employment-based preference. *See* Department of Homeland Security, *Yearbook of Immigration Statistics: 2013* at 31-34, *available at* http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf. Thirty five percent of the admittees were from India, 19% were from China, and 14% were from South Korea. In contrast, only 336 individuals (0.35%) were admitted under the employment-based preference from Vietnam.

colonization and marginalization on their own native land. Their post-colonial histories and relative lack of agency have made these communities the most misrepresented of any group of Asian Americans and Pacific Islanders by the model minority myth. *See* Teranishi, *Asians in the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education*, *supra*, at 27.

Today, many Southeast Asian and Pacific Islander communities remain economically disadvantaged and struggle with long-term poverty, language, and literacy issues as well as post-traumatic stress disorder. *See, e.g.*, Min Zhou & Carl Bankston, *Straddling Two Social Worlds: The Experience of Vietnamese Refugee Children in the United States*, Urban Diversity Series No. 111, 20-22 (2000), *available at* http://www.eric.ed.gov/PDFS/ED439180.pdf. In 2013, while other ethnic groups had poverty rates at or below the national average for Asian Americans (12.7%), rates for Hmong (25.6%), Cambodians (19.9%), and Vietnamese (15.5%) were substantially higher. U.S. Census Bureau, *2013 American Community Survey 1-Year Estimates*, *available at* http://factfinder.census.gov/. Unemployment rates for Hmong (6.6%), Laotians (6.3%), and Cambodians (7.2%) also exceeded the average for all Asian Americans (4.2%). *Id.* Poverty (20.1%) and unemployment (8.4%) rates for Native Hawaiians and Pacific Islanders are similarly high. *Id.*

These socioeconomic factors are accompanied by poorer educational outcomes. Southeast Asians lag behind other Asian American subgroups in educational attainment. In 2013, over 30% of

Hmong, Cambodian, and Laotian individuals over the age of 25 did not have a high school degree, compared with an average of 13.8% for all Asian Americans. *See id.* Predictably, the road to higher education only gets tougher for Southeast Asians. While 29.7% of all Asian Americans earned a bachelor's degree, the attainment rate for Vietnamese is just above 20% and for other Southeast Asians the rate is only about 12%. *Id.*[20]

b. Substantial Economic and Educational Disparities Exist Among Asian American Subgroups in Texas

Consistent with national data, significant economic and educational disparities can be found among Asian American subgroups in Texas. According to the 2010 Census, the three largest Asian American ethnic groups in Texas are, in descending order, Indian, Vietnamese, and Chinese.[21] Students in Texas communities with a high concentration of Indian and Chinese students

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[20] While only 13.6% of Native Hawaiians and Pacific Islanders did not have a high school degree, the percentage who earned a bachelor's degree fell to 11.8%, compared to 29.7% of all Asian Americans. U.S. Census Bureau, *2013 American Community Survey 1-Year Estimates*, *available at* http://factfinder.census.gov/.

[21] In 2010, Native Hawaiians and Pacific Islanders made up less than 0.1% of the population in Texas. *See* U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2010*, *available at* http://factfinder.census.gov/.

tend to be more affluent and achieve higher SAT scores.[22] For example, Coppell, an upper-middle class suburb that has benefited economically from development near the Dallas/Fort Worth International Airport, has one of the most distinguished school districts in the state. Fifty-nine percent of the Asian American population in the Coppell school district is Indian.[23] In 2013,

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[22] Even though the Texas Education Agency ("TEA") does not report disaggregated data on Asian American subgroups, disparities can be assessed by comparing economic and educational data for census designated places with data on different Asian subgroup concentrations as surveyed by the U.S. Census Bureau. This analysis shows that as the proportion of Indian and Chinese students in the population increases, both average SAT scores for Asian students and the percentage of Asian students who test as "college ready" tend to increase and the percentage of Asian students deemed "economically disadvantaged" tends to decrease. These trends run inversely as the proportion of Vietnamese students increases: average SAT scores and the percentage of Asian students who test as "college ready" tend to decrease and the percentage of Asian students considered "economically disadvantaged" tends to increase. *See* U.S. Census Bureau, *2006-2010 American Community Survey 5-Year Estimates*, *available at* http://factfinder.census.gov/ ("ACS 5-Year Estimates"); Texas Education Agency, *2009-2010 Academic Excellence Indicator System Reports*, *available at* http://ritter.tea.state.tx.us/perfreport/aeis/2010/; *see also* U.S. Census Bureau, *2008-2010 American Community Survey 3-Year Estimates*, *available at* http://factfinder.census.gov/.

[23] In 2013, approximately 9% of the Asian American population in Coppell ISD was Chinese, and 7% was Vietnamese. *See* ACS 5-Year Estimates.

median income in Coppell was about $110,000,[24] and 10% of its students were deemed to be economically disadvantaged.[25] The average SAT score for Asian American students in Coppell was 1250 (out of 1600),[26] and 92% of Asian students tested as college ready.[27]

By contrast, students in communities with higher Vietnamese populations tend to be more economically disadvantaged, achieve lower SAT scores, and are less prepared for college. For example, 56% of the Asian American population in the Arlington school district, another suburb of Dallas-Fort Worth, is Vietnamese.[28] In 2013, median income in this city was $52,933,[29] and 68% of its students were economically disadvantaged.[30]

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[24] U.S. Census Bureau, *2009-2013 American Community Survey 5-Year Estimates*, *available at* http://factfinder.census.gov/.

[25] Texas Education Agency, *2012-2013 Texas Academic Performance Reports*, *available at* http://ritter.tea.state.tx.us/perfreport/tapr/2013/.

[26] Texas Education Agency, *SAT District-Level Data: Class of 2013*, (Aug. 19, 2015), *available at* http://tea.texas.gov/acctres/SAT_District_Data_class_2013/.

[27] Texas Education Agency, *2012-2013 Texas Academic Performance Reports*, supra note 25.

[28] In 2013, approximately 11% of the Asian American population in Arlington ISD was Chinese, and 11% was Indian. *See* U.S. Census Bureau, *supra* note 24.

[29] *Id.*

[30] Texas Education Agency, *2012-2013 Texas Academic Performance Reports*, *supra* note 25.

The average SAT score for Asian American students in Arlington was 1033 (out of 1600),[31] and only 65% of Asian students tested as college ready.[32]

As discussed, the economic and educational disparities experienced by Vietnamese and other Southeast Asian communities in Texas reflect in large part their migration experiences. After leaving their homeland due to unrest or persecution and arriving with few economic resources, members of refugee communities have sometimes been met with hostility based on race or ethnic origin. In Texas, some Vietnamese refugees found opportunities in commercial shrimping along the Gulf coast. Working long hours, these refugees began buying their own boats, only to face intimidation and harassment by armed White supremacists. *See Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1001-06 (S.D. Tex. 1981). Students growing up in these communities have faced unique challenges and have immeasurable potential to contribute to the diversity of the learning environment at UT.

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[31] Texas Education Agency, *SAT District-Level Data*, *supra* note 26.

[32] Texas Education Agency, *2012-2013 Texas Academic Performance Reports*, *supra* note 25.

2. UT's process of individualized review allows for consideration of each applicant's performance and personal circumstances.

Narrowly tailored, individualized admissions programs like UT's are well suited to take into account the heterogeneity of the Asian American and Pacific Islander community as they pursue the substantial educational benefits of student diversity. *See, e.g., Smith v. University of Washington Law School*, 392 F.3d 367, 378 (9th Cir. 2004) (upholding admissions program that recognized "different cultures, backgrounds, and languages" of "applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People's Republic of China").

Under UT's admissions policy for non-Top 10% applicants, race has no predetermined or numerical impact on an applicant's Personal Achievement Score ("PAS"). *See, e.g.*, S. Ct. JA 222a-223a (Ishop Dep.).[33] Instead, as one admissions official observed, consideration of an applicant's race or racial background can be "as beneficial for some as their level of involvement with student council may be beneficial for some, as the strength of their letter

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[33] In calculating the PAS, UT considers an applicant's essay scores and demonstrated leadership qualities; awards and honors; work experience; involvement in extracurricular activities and community service; and special circumstances such as the applicant's socioeconomic status, family status and family responsibilities, and race. *See* S. Ct. SJA 152a.

of recommendation may be beneficial for some." S. Ct. JA 259a (Ishop Dep.). Importantly, the consideration of race in admissions can positively impact applicants regardless of whether they belong to an underrepresented minority or some other group. *See* S. Ct. JA 256a (Ishop Dep.); S. Ct. JA 334a-335a (Walker Dep.). In this respect, UT's plan is even more narrowly tailored than the plan in *Grutter*, in which the University of Michigan Law School considered race as a "plus factor" only with respect to applicants belonging to underrepresented minority groups. *See Grutter*, 539 U.S. at 321. In addition, no one at UT monitors the number of admittees in any particular group to ensure the enrollment of a critical mass of underrepresented minority students. *Compare* S. Ct. JA 448a, with *Grutter*, 539 U.S. at 318.

Individualized review allows for a multi-faceted view of diversity, which in itself promotes UT's compelling interest in diversity. Universities have an interest in student bodies that are sufficiently diverse within each racial group, whether that be with regards to socioeconomic status, viewpoints, areas of interest, or some other factor. Justice Powell recognized this issue in *Bakke* when he quoted a statement about Harvard College's program:

> [An] admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city

> ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa.

Bakke, 438 U.S. at 324 (Appendix to opinion of Powell, J., concurring). *See also id.* at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element"). When there is sufficient diversity within diversity, "racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Grutter v. Bollinger*, 539 U.S. 306, 320 (U.S. 2003). When a racial group is represented by a group of otherwise diverse individuals, all students benefit. This diversity within diversity breaks down racial stereotypes and prevents students from forming overly simplistic views of other racial groups; students will see firsthand that simply knowing someone's race does not tell you everything about their background, experiences, or viewpoints. *See* Vinya Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 Seton Hall L. Rev. 761, 819 (2015) ("Students with such different perspectives help break down racial stereotypes and facilitate the educational benefits of diversity - the

constitutional justification for race-conscious admissions policies in the first place.").

Because the consideration of race in UT's individualized admissions process can benefit any applicant, Asian Americans and Pacific Islanders (including but not limited to members of disadvantaged subgroups) can benefit from it as well. *See* UT Br. at 30-31; *Smith*, 392 F.3d at 379 & n.11 (upholding admissions program that gave "plus factor" to Filipino applicants "in order to enroll a sufficiently large and diverse group of Asian Americans"); Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 Vand. L. Rev. En Banc 113, 120-21 (2012) (stating that UT admissions process can benefit "Asian students who defy the stereotype of the 'model minority' and are burdened by poverty – the reality for discrete Asian sub-groups in America"); William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans are Still Caught in the Crossfire*, 11 Mich. J. Race & L. 605, 623 (2006) (observing that "some underrepresented . . . groups (e.g., Filipinos, Southeast Asians, Pacific Islanders) can directly benefit from affirmative action in higher education"). For UT applicants with lower SAT scores and GPAs, consideration of race in the distinctive context of their background and experience may give them a higher PAS. For example, a student of Southeast Asian origin whose parents are refugees and who attends a majority-minority public high school in Texas may receive a higher score than she would absent the consideration of race. A higher PAS will not

guarantee her admission to UT, but might improve her chances.

In short, UT's process of individualized review advances its compelling interest in achieving the educational benefits of student diversity, increases the likelihood of admission for those who do not have the same social mobility and capital as others, and has the potential to benefit all Asian American and Pacific Islander applicants. Claims that UT's policy pits one minority group against another – by, for example, "giving preferences to Hispanic applicants, while disfavoring Asian American applicants," *see* AALF Br. at 6 – have no basis in the record.

To the contrary, the data show that from 2004 to 2010 a higher percentage of Asian American students admitted by UT have been admitted through individualized (non-Top 10%) admissions than the corresponding percentage of Hispanic admittees. *See* S. Ct. SJA 158a tbl.2a; 2010 Top 10% Report at 9 tbl.2a.

In 2008, the year for which plaintiff applied for admission, 16% of the total number of Asian Americans admitted to UT from Texas high schools were admitted through individualized review, as opposed to 13% of Hispanic students. S. Ct. SJA 158a tbl.2a. These numbers confirm that rather than attempting to match the racial composition of its student body with Texas demographics, UT has admitted students outside the Top 10% plan based on an individualized review of each applicant's performance and personal circumstances.

UT has not achieved a critical mass without the need for holistic review. The effectiveness of such "percentage plans," depends on a high level of de facto racial segregation in the underlying secondary school system. *See* Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 Ohio St. L.J. 1729, 1733-1734 (2001). Amici question the wisdom of relying solely, and on a long-term basis, on a system that presupposes the existence of residential segregation for ensuring educational diversity at UT. In addition, this approach tends to disadvantage Asian Americans and Pacific Islanders because they tend to live in more integrated communities than other racial groups. *See* John Iceland, *Beyond Black and White: Metropolitan Residential Segregation in Multi-Ethnic America*, 33 Soc. Sci. Res. 248, 250 (2004).

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision below.

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NOVEMBER 2015

APPENDIX

APPENDIX: LIST OF AMICI CURIAE

Organizational Entities

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Asian American Action Fund

Asian American Federation

Asian Americans United

Asian/Asian American Faculty and Staff Association, University of Texas at Austin

Asian Desi Pacific Islander Collective, University of Texas at Austin

Asian Pacific American Law Students Association, University of California, Irvine School of Law

Asian/Pacific Islander Caucus-National Conference on Race and Ethnicity in Higher Education

Asian Youth Promoting Advocacy and Leadership

Boat People SOS – Delaware Valley

Center for Pan Asian Community Services, Inc.

Chinese for Affirmative Action

DRUM-Desis Rising Up and Moving

Khmer Girls in Action

MinKwon Center for Community Action

National Asian Pacific American Women's Forum

National Queer Asian Pacific Islander Alliance

Project Reach

Southeast Asia Resource Action Center

Ugnayan Youth for Justice and Social Change

Vietnamese American Young Leaders Association of New Orleans

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